

UNPUBLISHED
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

CINDY M. WILBERDING, Executor of
the Estate of Thomas A. Huff,
Deceased,

Plaintiff,

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

No. C04-4066-MWB

**REPORT AND
RECOMMENDATION**

This matter is before the court on the defendant's motion (Doc. No. 11) for remand pursuant to sentence four of 42 U.S.C. § 405(g).

Ordinarily, in cases when a claimant files an appeal from the denial of Social Security benefits, the Commissioner answers the complaint, and then, in the course of reviewing the file, the Commissioner files a motion for sentence four remand and entry of judgment, the court reserves ruling on the motion for remand until the Commissioner has filed a brief on the merits and the court has conducted a plenary review of the record. This is in accordance with section 405(g), which allows the court to enter judgment, with or without remanding the case for further action, only "upon the pleadings and transcript of the record." 42 U.S.C. § 405(g), sentence four.

However, this case comes before the court in a posture different from the norm. The plaintiff's decedent, Thomas A. Huff, previously filed an appeal from the denial of

benefits for the period between May 22, 1995, and July 23, 1998. (See C01-4112-MWB) While his first application was pending, Mr. Huff filed another application for benefits, and he was found to be disabled. Prior to, during, and subsequent to the ALJ hearing on the first application, Mr. Huff's attorney asked the ALJ to obtain the subsequent claim file for review. The ALJ failed to obtain the subsequent claim file, and issued a decision unfavorable to Mr. Huff.

In Chief Judge Mark W. Bennett's order for remand (Doc. No. 17 in C01-4112-MWB), he noted review of the subsequent claim file was required under the Social Security Administration's own regulations. Chief Judge Bennett found the ALJ's "failure to follow internal procedures and consider whether the evidence in a subsequent favorably decided claim is new and material was unfair and prejudicial." (*Id.* at 11-12) Thus, Chief Judge Bennett entered judgment for Mr. Huff, and remanded the case for further development of the record, specifically to include consideration of the evidence from Mr. Huff's subsequent claim file. (*Id.* at 16-17) Chief Judge Bennett directed the Administration to develop the record fairly and fully, and to "articulate an assessment of the evidence of the subsequent claim," for the express purpose of allowing the court to engage in a substantial evidence review if judicial review again was sought by Mr. Huff. (*Id.* at 17)

On remand, the ALJ apparently once again failed to obtain Mr. Huff's subsequent claim file, despite the court's order and repeated requests by the plaintiff's attorney. (See *id.*; Doc. No. 8 at 1) The ALJ issued another decision denying Mr. Huff's claim without obtaining or considering the subsequent claim file, without documenting any attempts he made to locate the file, and without articulating his assessment of the evidence of the subsequent claim as ordered by this court.

Thus, Mr. Huff's claim is, once again, before the court on appeal of the most recent denial of benefits for the period in question.¹ In the plaintiff's brief on the merits, she argues the record contains substantial evidence that Mr. Huff was disabled during the period from May 22, 1995, to July 23, 1998. The Commissioner has not filed a brief on the merits, but instead has filed the present motion, seeking remand with instructions for the ALJ to locate Mr. Huff's subsequent claim file, and to review the evidence of the subsequent claim as previously directed by Chief Judge Bennett. The Commissioner suggests that in the alternative, if the file cannot be located, then the ALJ should be directed to document the efforts made to locate the file. (See Doc. No. 11-2 at 1-2)

The plaintiff does not resist the Commissioner's motion for entry of judgment and remand. (Doc. No. 12) Under the present circumstances, the court finds remand would be appropriate. The undersigned previously conducted an extensive review of Mr. Huff's first claim file, and found the file contained substantial evidence to support the Commissioner's decision that Mr. Huff was not disabled. However, the undersigned did not take into account the missing subsequent claim file, and the effect the evidence within that file might have had on the Commissioner's decision. As a result, any further review of the matter without the subsequent claim file would be incomplete and inconclusive.

For these reasons, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections² to the Report and Recommendation in accordance with 28 U.S.C.

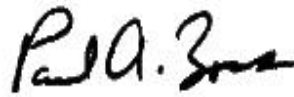
¹Mr. Huff is now deceased, and the plaintiff, Ms. Wilberding, is the executor of his estate.

²Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. See Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. See *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

§ 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that the Commissioner's motion for remand (Doc. No. 11) be granted, judgment be entered in favor of the plaintiff, and this matter be remanded for further development of the record consistent with this opinion.³

IT IS SO ORDERED.

DATED this 23rd day of March, 2005.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

³**NOTE TO PLAINTIFF'S COUNSEL:** If final judgment is entered for the plaintiff, the plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.